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No. 91-846

In the Supreme Court of the United States

OCTOBER TERM, 1991

IRVIN JAY MILZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to allow petitioner to introduce extrinsic evidence of a government witness's prior statement.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A54) is reported at 934 F.2d 1325.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1991. A petition for rehearing was denied on August 29, 1991. The petition for a writ of certiorari was filed on November 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to possess

methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 846, and two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1). Gov't C.A. Br. 6-7, 9. He was sentenced to 235 months in prison and fined $100,000. *Id.* at 9. The court of appeals affirmed. Pet. App. A1-A54.

1. The evidence at trial established that petitioner was a member of a large-scale conspiracy to manufacture and distribute methamphetamine. One of the government's witnesses, Wesley Gerald Schneider, pleaded guilty to participating in the conspiracy and agreed to cooperate with the government. Schneider testified at trial concerning various narcotics dealings between petitioner and the leader of the drug operation, John Robinette. At one point during the course of his testimony, Schneider testified that petitioner sold methamphetamine for Robinette. 6 Tr. 1442. Schneider also recounted a meeting that he had attended in which petitioner asked Robinette for a reduction in price for the drug because petitioner was Robinette's major buyer and was paying cash. Pet. App. A5; Gov't C.A. Br. 21-22.

On cross-examination, petitioner's counsel asked Schneider whether he remembered a conversation that had occurred at a local restaurant and touched on petitioner's role in the conspiracy. Schneider responded that he recalled that the conversation had taken place, but could not recall what had been said. Pet. App. A40; Gov't C.A. Br. 51-52.

Petitioner subsequently called as a witness one James Parker, who had been present during the restaurant conversation. Petitioner's counsel asked Parker to relate what the other two men had said. The district court excluded Parker's testimony on hearsay grounds. Pet. App. A40.

Petitioner proffered Parker's testimony outside the presence of the jury. If permitted to testify, Parker would have stated that, during the conversation in question, Schneider informed petitioner that he had told his attorney that he "thought [petitioner] was one of John Robinette's distribution points." According to Parker, petitioner responded: "You shouldn't be telling your attorney that, it's not so. I don't appreciate you spreading those kind of things about me." Schneider then replied: "Well, perhaps I'm wrong. I'm sorry I brought it up." 7 Tr. 1655-1656.

2. In the court of appeals, petitioner argued that the district court abused its discretion in refusing to permit him to introduce Parker's testimony to impeach Schneider's credibility. He claimed that the testimony was admissible under Rule 613(b), Fed. R. Evid., which permits the district court to admit "[e]xtrinsic evidence of a prior inconsistent statement by a witness" after the witness "is afforded an opportunity to explain or deny" the statement. The court of appeals rejected petitioner's claim, holding that "on the facts of this case, Schneider's claim of faulty memory did not constitute an inconsistent statement." Pet. App. A41. Because Parker's testimony could not be used to impeach Schneider, the court held that the district court did not abuse its discretion in excluding Parker's testimony as hearsay. Pet. App. A41-A42.

ARGUMENT

Petitioner contends that the court of appeals erred in holding that extrinsic evidence of a witness's prior inconsistent statement is not admissible under Rule 613(b) when the witness testifies that he does not remember making the prior statement. Pet. 5-13. The court of appeals, however, did not categorically rule that extrinsic evidence may not be used for impeachment when a witness asserts an inability to remember; rather, the court ruled narrowly that "on the facts of this case" the district court did not abuse its discretion in excluding the extrinsic evidence of Parker's prior statement. That conclusion was correct and does not warrant further review by this Court.

Rule 613(b), Fed. R. Evid., provides in relevant part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. * * *

A district court has considerable discretion in determining whether a witness's prior statement is inconsistent with his or her testimony at trial. See, *e.g.*, *United States* v. *Causey*, 834 F.2d 1277, 1282-1283 (6th Cir. 1987), cert. denied, 486 U.S. 1034 (1988); *United States* v. *McCrady*, 774 F.2d 868, 873 (8th Cir. 1985).

The district court acted within its discretion in excluding the proffered evidence of Schneider's prior statement, because the statement was not inconsistent with Schneider's testimony concerning petitioner's

involvement in the distribution of methamphetamine for Robinette. See, *e.g.*, *United States* v. *Stone*, 702 F.2d 1333, 1340 (11th Cir. 1983) (no abuse of discretion in excluding extrinsic evidence where counsel did not "clearly explain" inconsistency); *United States* v. *Tracey*, 675 F.2d 433, 440 (1st Cir. 1982) (starting point of analysis was whether prior statements "in fact contradicted [the witness's] testimony"); *United States* v. *Palumbo*, 639 F.2d 123, 128 n.6 (3d Cir.) (no abuse of discretion in excluding prior statement when in-court assertion is "not necessarily inconsistent") (emphasis omitted), cert. denied, 454 U.S. 819 (1981). According to Parker, petitioner told Schneider that he "should not be telling [his] attorney that [petitioner was one of Robinette's distribution points], it's not so." Schneider responded, according to Parker: "Well, perhaps I'm wrong. I'm sorry I brought it up." In light of Schneider's extensive testimony concerning his first-hand observation of petitioner's dealings with Robinette, see Gov't C.A. Br. 21-22, the response attributed to him by Parker suggests that Schneider believed that he was wrong to have raised the subject with his lawyer, not that he was wrong about the nature of petitioner's relationship with Robinette. Even if the statement referred to Schneider's conclusion about the relationship between petitioner and Robinette, Schneider's tentative and apologetic acknowledgement to petitioner that he might be "wrong" can hardly be deemed inconsistent with Schneider's detailed testimony at trial concerning the unlawful business relationship between Robinette and petitioner.

Nor was there any inconsistency between petitioner's alleged prior statements during the restaurant conversation and his testimony at trial that he did

not remember the contents of that conversation. Neither the district court nor the court of appeals found that Schneider was falsely claiming lack of memory in order to avoid impeachment with his prior statement. Nor does petitioner point to anything in the record that would support his suggestion, Pet. 12, that Schneider was a "recalcitran[t]" witness. Because there is no evidence that Schneider's inability to recall the contents of his conversation with petitioner was anything other than an honest failure of memory, the district court did not abuse its discretion in ruling that the proffered extrinsic evidence of petitioner's "restaurant statements" was inadmissible to impeach Schneider's credibility. See, *e.g.*, *United States* v. *Rogers*, 549 F.2d 490, 496 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); *United States* v. *Insana*, 423 F.2d 1165, 1170 (2d Cir.), cert. denied, 400 U.S. 841 (1970); see also *Palumbo*, 639 F.2d at 128 n.6 ("lack of memory as to the substance of a prior statement may not be inconsistent in certain circumstances with the prior statement").

As petitioner notes, Pet. 9, courts of appeals have held that a witness's claim that he or she cannot remember making a prior statement may in effect be inconsistent with the prior statement and thus justify the admission of that statement for impeachment purposes. Nothing in those decisions, however, conflicts with the decision in this case. In *United States* v. *Thompson*, 708 F.2d 1294 (8th Cir. 1983), the court of appeals held that the district court did not abuse its discretion in permitting the prosecutor to read portions of a witness's testimony from a previous trial while he examined the witness. *Id.* at 1302. The witness admitted giving the prior testimony but refused to acknowledge its truth, insisting that he could not recall the events about which he had testi-

fied. *Ibid.* The court noted that a district court "should have considerable discretion to determine whether evasive answers are inconsistent with statements previously given." *Ibid.* Because the witness in *Thompson* had been "particularly recalcitrant, argumentative, and hesitant," the court of appeals concluded that the district court did not abuse its discretion in concluding that the evasive answers were inconsistent with the prior statements. *Ibid.* That determination does not conflict with the court of appeals' conclusion here that "on the facts of this case," Pet. App. A41, the district court acted within its discretion in refusing to find that Schneider's lack of recollection regarding the "restaurant statements" was inconsistent with those statements.

The other allegedly conflicting decisions, all of which precede the adoption of the Federal Rules of Evidence, similarly fail to support petitioner's claim. In *Bowman* v. *Kaufman*, 387 F.2d 582 (2d Cir. 1967), the court of appeals held that the district court erred in excluding evidence of a witness's prior statement that the driver of a vehicle had told him that its brakes did not work. In so holding, the court of appeals noted that the witness was "evasive" and "took questionably frequent resort to failure to remember and inability to recall." *Id.* at 589. The witness, moreover, flatly denied the substance of the prior statement, rather than merely claiming that he could not remember what he had said. *Ibid.* That case, like *Thompson*, was thus one in which the witness's testimony at trial was properly deemed inconsistent with his prior statements, even though the testimony consisted mainly of assertions of lack of recollection.

In *Williamson* v. *United States*, 310 F.2d 192 (9th Cir. 1962), the court of appeals held that the district court acted properly in admitting extrinsic evidence of a prior inconsistent statement even though the defendant testified that he did not "recall saying that." *Id.* at 198. The court noted that the inconsistency that the government sought to exploit was not between the prior statement and the denial of recollection, but between the prior statement and the squarely contrary testimony that the defendant gave at trial. *Ibid.* Moreover, the court explained, the prior statement was admissible as affirmative evidence because it was the admission of a party. *Id.* at 199. *Woods* v. *United States*, 279 F. 706 (4th Cir. 1922), was another case in which the witness allegedly made statements before trial that were inconsistent with his trial testimony. The witness denied any recollection of the prior statements, and when the district court excluded proof regarding those statements, the court of appeals reversed. The court held that the defendant was entitled to introduce the prior statements because they were inconsistent with the witness's affirmative testimony at trial and because they tended to show bias on the part of the witness. *Id.* at 711.

In this case, unlike each of the foregoing cases, there was no inconsistency between the prior statement and the trial testimony, and the court of appeals properly determined that there was no inconsistency between the prior statement and the witness's denial of recollection of the statement. The predicate of inconsistency—which is essential for admission of a prior statement under Rule 613(b)—was therefore absent here.

Petitioner seizes on a single sentence in the court of appeals' opinion, in which the court stated that

proof of an inconsistent statement "may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement." Pet. App. A41. That sentence, he contends, indicates that the Fifth Circuit is now committed to the position that a witness can bar the admission of an inconsistent statement just by feigning a lack of recollection of its contents. Pet. 8. Aside from the fact that the authority the court cites at that point in its opinion does not support that interpretation,[1] we do not believe that the quoted sentence should be read in that fashion. Instead, the passage in question should be read, we believe, as being consistent with the more conventional point that an asserted failure to recall a statement can in effect be inconsistent with the prior statement itself if the circumstances make it appear that the denial of recollection is feigned. That interpretation of the sentence on which petitioner focuses is buttressed by the court of appeals' reference to *United States* v. *Balliviero*, 708 F.2d 934, 939-940 (5th Cir.), cert. denied, 464 U.S. 939 (1983), in the immediately following paragraph. That case stands for the proposition that a denial of recollection of a statement is not necessarily inconsistent with the statement itself—an accepted principle of evidence law that appears to be the same principle that the court of appeals intended to express in the sentence on which petitioner focuses. Because there was no inconsistency among the statements at issue in this case—the witness's trial testimony and either his alleged "restaurant statements" or his denial of re-

[1] The case cited, *United States* v. *Sisto*, 534 F.2d 616 (5th Cir. 1976), states that a prior inconsistent statement may be proved by extrinsic evidence "if on cross-examination the witness has denied making the statement, *or has failed to remember it.*" *Id.* at 622 (emphasis added).

collection of the content of those statements—the court of appeals properly held the proffered evidence inadmissible under Rule 613(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

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